

ORIGINAL

J. SCOTT MOEDE, OSB No. 934816
Email: scott.moede@portlandoregon.gov
Volunteer Attorney
Lewis and Clark Legal Clinic
1018 Board of Trade Building
310 SW Fourth Avenue
Portland, OR 97204-2387
Telephone: (503) 768-6500
Facsimile: (503) 768-6540
Of Attorneys for Plaintiff Patrick Kelly

FILED 09 FEB '12 14:20 USDC-ORP

**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION**

PATRICK KELLY,

PLAINTIFF,

v.

**UNITED STATES OF AMERICA,
DEFENDANT.**

CV '12 - 240 **SI**
Civil No. _____

**COMPLAINT AND DEMAND FOR JURY
TRIAL**

Plaintiff, Patrick Kelly, alleges the following against defendant, the United States of America:

JURISDICTION

1. Mr. Kelly seeks the return of \$3,638.99, plus applicable interest and penalties wrongfully taken by the Internal Revenue Service (IRS) and, therefore, the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1340 and 1346(a)(1) and 26 U.S.C. § 7422(a).

VENUE

2. Venue is proper in this district under 28 U.S.C. § 1391(e) because defendant is the United States of America and Mr. Kelly currently resides in the District of Oregon.

PARTIES

3. Patrick Kelly is a citizen of the United States and resides at 10172 SE 43rd, Milwaukie, Oregon 97222.

4. Defendant is the United States of America.

FACTS

5. Mr. Kelly timely filed his 2008 tax return (Form 1040A) reporting a refund of \$4,027.

6. Mr. Kelly filed as head of household because he and his former wife, Alisha Kelly, had been divorced since 2005 and Mr. Kelly's only child, Marissa Kelly, lived with Mr. Kelly after the divorce. Marissa only visited Ms. Kelly a few times a year for vacation. Alisha Kelly does not pay child support to Mr. Kelly and did not pay child support in 2008. Mr. Kelly paid and continues to pay for Marissa's living expenses.

7. The refund amount claimed was partially based on Mr. Kelly taking the Earned Income Credit (EIC) and Additional Child Tax Credit.

8. Originally, Mr. Kelly was issued a refund of \$3,251.86. The refund issued was less than Mr. Kelly claimed because \$775.14 was credited against an outstanding 2006 tax liability under 26 U.S.C. § 6402(a). Mr. Kelly is not seeking the return of this \$775.14 as it was properly applied to his existing liability. He is only seeking the \$3,251.86 plus interest and penalties that he had a right to receive as a refund for the 2008 tax year.

9. On November 16, 2009, Mr. Kelly received a letter from the IRS requesting information concerning his filing status, EIC qualifications, and claimed dependent qualifications.

10. On December 28, 2009, Mr. Kelly received a second letter from the IRS assessing a tax deficiency of \$4,414.13 for 2008.

/////

11. The deficiency for 2008 was determined by the IRS because: (1) the IRS denied Mr. Kelly's Head of Household status and determined that he should have filed as Single instead; (2) the IRS denied Mr. Kelly's claim for the EIC; and (3) the IRS denied Mr. Kelly's deduction for claiming his daughter, Marissa, as a dependent.

12. Mr. Kelly timely filed his 2009 tax return (Form 1040) reporting a refund of \$4,188 – again claiming Head of Household status, the EIC, and claiming his daughter, Marissa, as a dependent.

13. On March 15, 2010, Mr. Kelly received a letter from the IRS informing him that his return would be audited based on his claims for Head of Household status, EIC, and claiming Marissa as a dependent.

14. On September 27, 2010, the IRS sent a letter to Mr. Kelly notifying him that he had successfully recertified for the EIC for 2009 and that he would not have to fill out Form 8862 – Information to Claim Earned Income Credit After Disallowance – in future years.

15. Because Mr. Kelly was allowed his 2009 EIC, he was entitled to an overpayment refund of \$2,451. This overpayment refund was applied to the \$4,414.13 deficiency from 2008 leaving Mr. Kelly with an outstanding liability of \$2,042.23.

16. Mr. Kelly was again allowed to claim the EIC on his 2010 return. This resulted in a tax refund. On February 28, 2011, \$2,125.51 was applied to Mr. Kelly's outstanding 2008 liability. With this payment, Mr. Kelly's 2008 liability was completely paid.

17. In 2008, Mr. Kelly's gross income was \$19,906 – well under the \$33,995 limit for EIC eligibility.

18. Marissa's birth certificate lists Mr. Kelly as her father and also proves that she was under the age of 19 in 2008.

19. Records from Marissa's school show that she lived at the same address as Mr. Kelly for at least half of 2008.

20. Mr. Kelly has been responsible for Marissa's living expenses since his divorce in 2005 – he has fed and clothed Marissa, had her attend school, and provided her with a home since 2005 while mother has lived in another state.

21. This claim is timely under 26 U.S.C. § 6511(a) because the return was filed April 15, 2009, and this claim has been filed within three years of that date.

22. Mr. Kelly's original 2008 return constitutes a valid claim for refund under 26 C.F.R. § 301.6402-3(a)(2) and Treas. Reg. § 301.6402-3(a)(1) and 26 U.S.C. § 7422(a).

FIRST CLAIM FOR RELIEF

(Refund for 2008 EIC and all penalties and interest – 28 U.S.C. § 1346(a)(1))

23. Mr. Kelly incorporates herein by reference the allegations contained in paragraphs 1 through 22, above.

24. The United States of America, through the activity of the IRS, has unlawfully collected \$3,638.99 plus penalties and interest, and Mr. Kelly is entitled to recover from the United States of America the \$3,638.99 plus applicable interest and penalties pursuant to 28 U.S.C. § 1346(a)(1).

SECOND CLAIM FOR RELIEF

(Attorney's fees and costs – 26 U.S.C. §§ 7430, 7433, and Treas. Reg. § 301.7433(c) & (h))

25. Mr. Kelly incorporates by reference the allegations contained in paragraphs 1 through 24 above.

26. Mr. Kelly is entitled to an award of attorney's fees and costs, pursuant to 26 U.S.C. §§ 7430, 7433, and Treas. Reg. § 301.7433(c) and (h) based upon the actions of the United States of America, through the IRS, as alleged in paragraphs 1 through 24 above.

DEMAND FOR JURY TRIAL

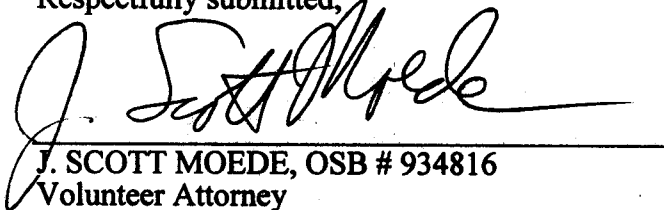
27. Pursuant to Rule 38, Federal Rules of Civil Procedure, Mr. Kelly hereby demands a trial by jury in all of the issues set forth in this Complaint

WHEREFORE, Mr. Kelly respectfully requests entry of judgment in his favor against the United States of America as follows:

1. Return of the \$3,638.99 plus applicable interest and penalties to Mr. Kelly pursuant to 28 U.S.C. § 1346(a)(1).
2. Cost of this action, plus attorney's fees, litigation costs, and administrative costs allowable under 26 U.S.C. §§ 7430, 7433, and Treas. Reg. § 301.7433(c) and (h).
3. Such other relief as may be justified.

Dated: February 9, 2012.

Respectfully submitted,



J. SCOTT MOEDE, OSB # 934816

Volunteer Attorney

Lewis and Clark Legal Clinic

Telephone: (503) 768-6500

Of Attorneys for Plaintiff